



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 28, 2003

Mr. Ken Johnson
Assistant City Attorney
P.O. Box 2570
Waco, Texas 76702-2570

OR2003-2100

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178537.

The City of Waco (the "city") received a request for information pertaining to bids for city health insurance and employee benefit consulting agreements for 1997-2002. You state that some responsive information will be made available to the requestor. You claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

You first assert that the submitted information is excepted from disclosure based on section 552.101 of the Government Code in conjunction with article 26.96 of the Insurance Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Article 26.96 pertains to the reporting of claims information by an employer health benefit carrier to the employer, and provides in pertinent part:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) An employer carrier . . . shall report to the employer information from the 12 months preceding the date of the report regarding:

(1) the total amount of charges submitted to the carrier for persons covered under the employer health benefit plan;

(2) the total amount of payments made by the carrier to health care providers for persons covered under the plan; and

(3) to the extent available, information on claims paid by type of health care provider, including the total hospital charges, physician charges, pharmaceutical charges, and other charges.

(e) An employer carrier may not report any information required under this article the release of which is prohibited by federal law or regulation.

(f) Claim information provided by an employer carrier under this section shall be provided in the aggregate, without information through which a specific individual covered by the health insurance or evidence of coverage may be identified.

Ins. Code art. 26.96(b)(1)-(3), (e), (f). However, article 26.96 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (confidentiality protected by section 552.101 requires express language making certain information confidential or requiring that information not be released to public).* Confidentiality cannot be implied from the structure of a statute or rule. *See Open Records Decision No. 465 at 4-5 (1987).* Accordingly, the city may not withhold any portion of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with Insurance Code article 26.96.

You also argue that article 21.49-19 of the Insurance Code makes confidential a portion of the submitted information. Section 3 of article 21.49-19 pertains to claim cost information, and provides as follows:

(a) [T]he issuer of the plan shall provide to the employer the claims cost information for employees covered by the plan during the preceding calendar year. . . .

(b) Claims cost information provided under this section may be provided either in the aggregate or on a detailed basis, but may not include:

(1) any information through which a specific individual enrolled in the group health benefit plan may be identified; or

(2) diagnosis codes or other information through which a diagnosis of a specific individual enrolled in the group health benefit plan may be identified.

(c) Information obtained by the employer under this section is confidential and may be used by the employer only for purposes relating to obtaining and maintaining group health benefit plan coverage for the employer's employees.

Ins. Code art. 21.49-19 § 3. Article 21.49-19 explicitly makes confidential the claims cost information for employees covered by the plan provided by the issuer of the plan to the employer. Based upon our review of your arguments and the submitted information, we find that a portion of the information at issue is claims cost information as contemplated by the statute. We conclude that the information that we have marked is confidential under article 21.49-19 of the Insurance Code, and is therefore excepted from public disclosure under section 552.101 of the Government Code. The remaining submitted information is not claims cost information, and must be released to the requestor, with the following exception.

We note that the information otherwise marked for release contains the e-mail address of a member of the public, which is excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold e-mail addresses of members of the public under section 552.137.

In summary, we have marked the information that is confidential under article 21.49-19 of the Insurance Code, and is therefore excepted from public disclosure under section 552.101 of the Government Code. The city must withhold e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 178537

Enc. Submitted documents

Mr. Ken Johnson - Page 6

c: Mr. Parrish Todd Dorton
3701 West Waco Drive
Waco, Texas 76710
(w/o enclosures)